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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 245.

THOMAS G. BUSH, THOMAS A. GILLESPIE, AND ORION L. HURLBUT, AS TRUSTEES IN BANKRUPTCY OF THE SOUTHERN CAR AND FOUNDRY COMPANY, A BANKRUPT, PLAINTIFFS IN ERROR,

versus

J. M. ELLIOTT, JR.

No. 246.

THOMAS G. BUSH, THOMAS A. GILLESPIE, AND ORION L. HURLBUT, AS TRUSTEES IN BANKRUPTCY OF THE SOUTHERN CAR AND FOUNDRY COMPANY, A BANKRUPT, PLAINTIFFS IN ERROR,

versus

ELLIOTT CAR COMPANY.

RELPY BRIEF FOR DEFENDANTS IN ERROR.

AMOS E. GOODHUE,
For Defendants in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 21375

(19,733 and 19,734.)

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REPLY BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

The purpose of this short brief is simply to make some suggestions as to questions propounded during the oral argument of the case.

If the construction contended for by opposing counsel be placed upon section 23 of the bankrupt act, then the following consequences will follow:

Suppose the Southern Car and Foundry Company had been an Alabama corporation, and Elliott a citizen of Alabama, and the trustees had all been citizens of New Jersey. Then, if the construction of appellant's counsel be correct, Elliott could not bring a suit against the trustees in the circuit court of the United States in New Jersey.

Nor could the trustees remove to the circuit court of the United States suits that Elliott might bring against them in the State courts either of New Jersey or of Alabama. If the construction contended for by appellant's counsel be correct, then it would follow that if Elliott failed to get service in the local courts of Alabama he would be forced to bring suit in the local courts of New Jersey against the trustees to assert his claim to property adversely claimed by the trustees.

Again, the question is asked, If the construction insisted on by appellees be given to subsection *a*, why was subsection *b* added thereto? In addition to the suggestions made in original brief, we desire to add that it may well be that Congress had it in mind to prevent the CREATION of jurisdiction in the Federal courts of actions brought by the trustees by the selection of a trustee with citizenship different from the citizenship of the bankrupt. If this construction be given to subsection *b*, it would apply to a state of facts like the following:

Suppose the Southern Car and Foundry Company, bankrupt, had been a citizen of Alabama and the trustees had all been citizens of New Jersey. In that event subsection *b* would prevent the trustees, so far as suits brought by them are concerned, from taking advantage of the jurisdiction that would otherwise arise out of diverse citizenship as between themselves and Elliott. In other words, subsection *b* may well be held to provide that in actions by trustees, where the jurisdiction is based on diverse citizenship, the complaint must show diverse citizenship as between the trustee and the proposed defendant in order to support juris-

diction under the judiciary act, and also diverse citizenship as between the bankrupt and the trustee, to prevent the defeating of that jurisdiction under the limitation provided by subsection *b* of section 23 of the bankrupt act.

If the construction suggested above be given subsection *b*, it would be in harmony with the construction given that part of the judiciary act which is as follows: "Nor shall any circuit or district court have cognizance of any suit except upon foreign bills of exchange to recover the contents of any promissory note or other chose in action, in favor of any assignee or of any subsequent holder, if such instrument be payable to bearer, and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents, if no assignment or transfer had been made."

In construing this section of the judiciary act it has been uniformly held that, where the suit has been brought by the assignee of the chose in action, the complaint must show diverse citizenship as between the transferee, plaintiff in the suit, and the defendant to support the jurisdiction under the general provisions of the judiciary act with regard to diverse citizenship of the parties to the suit, and must also show diverse citizenship as between the transferrer and the defendant in order to prevent the defeating of that jurisdiction by the additional limitation provided in the particular clause of the act above referred to.

The old cases of Brown *vs.* Strode, 5 Cranch, 303, and McNutt *vs.* Bland, 2 Howard, 10, can have no application to the case at bar under the principles announced by this court in Coal Company *vs.* Blatchford, 11 Wall., 177, where Justice Field, in referring to Brown *vs.* Strode and McNutt *vs.* Bland, says: "There is no analogy between these cases and the case at bar. The nominal plaintiffs in those cases were not trustees, and held nothing for the use or benefit of the real parties in interest. They could not, as is said in McNutt *vs.* Bland, prevent the institution or prosecution of the actions or exercise any control over them. The justices of the peace

in the one case, and the governor in the other, were the mere conduits through whom the law afforded a remedy to the parties aggrieved. In the case at bar, the plaintiffs are real prosecutors of the suit * * * so long as they do not refuse to discharge the trusts reposed in them other parties are not authorized to institute or prosecute any proceedings for the enforcement of the mortgage or to exercise any control over them."

So in the case now before the court the trustees in bankruptcy control the institution of the present suit, and can in no sense be said to be merely nominal parties, whose names are used by others and who can be disregarded as parties to the suit under the principle announced in Brown *vs.* Strode, "that where the real and only controversy is between citizens of different States or an alien or citizen and the plaintiff is by some positive law compelled to use the name of a public officer who has not or ever had any interest in or control over, the courts of the United States will not consider any others as parties to the suit than the persons between whom the litigation before them exists." It was suggested during the argument that the rules laid down in Bardes *vs.* Hawarden Bank had been modified by subsequent decisions of this court. An examination of the case of Jaquith *vs.* Rocoley, 188 U. S., 623, will show that, so far as the principles laid down in the Bardes case are applicable to a case like the one at bar, viz., an action by trustees in bankruptcy against an "adverse claimant," the decision of Bardes *vs.* Hawarden Bank has not been touched or limited.

Respectfully submitted.

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